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No. 900 49

In the Supreme Court of the United States

OCTOBER TERM, 1945

HANS MAX HAUPT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The majority and dissenting opinions (II R. 9)[1] and the dissenting opinion of Judge Major on denial of the petition for rehearing (II R. 33) are reported at 152 F. 2d 771.

[1] The record before this Court is in three parts, each of which is separately paginated. We shall refer to the stenographic transcript of the testimony at the trial as "R," to the volume containing the pleadings and proceedings in the district court as "I R," and to the volume containing the proceedings in the circuit court of appeals as "II R."

JURISDICTION

The judgment of the circuit court of appeals was entered December 20, 1945 (II R. 10), and a petition for rehearing (II R. 11–29; see also II R. 31) was denied January 24, 1946 (II R. 33). The petition for a writ of certiorari was filed February 28, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented by the petition for a writ of certiorari are:

1. Whether overt acts Nos. 10, 11, 12, 16, 20, 21, 22, and 23 are each supported by the testimony of two direct witnesses.

2. Whether the trial court erred in instructing the jury in connection with the twelve overt acts submitted to them that it was only necessary for the Government to prove by two witnesses the performance of any one of the overt acts.

3. Whether the trial court erred in receiving in evidence, restricted solely to the issue of treasonable intent, (a) petitioner's prewar statements showing an intense devotion to Hitler and Nazi Germany, (b) petitioner's extra-judicial admissions, (c) and the testimony of only one witness concerning overt acts which were not submitted

to the jury; and whether it was error to receive the testimony of Burger, a convicted saboteur, to show the enemy status of Herbert Haupt.

4. Whether reversible error is involved:

a. In the arguments to the jury of government counsel;

b. In permitting the jury to take a copy of the indictment and of the instructions to the jury into the jury room;

c. In reading to the jury, at their request after they had retired, the testimony of one defense witness and two government witnesses; and

d. Whether the verdict of the jury was the result of passion, prejudice, and war hysteria.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Art. III, sec. 3:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

* * * * *

Section 1 of the Criminal Code, 18 U. S. C. 1:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

STATEMENT

Petitioner was indicted (I R. 3–15) in the District Court of the United States for the Northern District of Illinois, for treason.[2] The indictment alleged that from June 17, 1942, to July 17, 1942, petitioner, a person who owed allegiance to the United States, unlawfully adhered to the enemies of the United States, the Government of the German Reich, with which the United States was at war. It was alleged that on June 17, 1942, Herbert Haupt, an agent of the German Reich, came to the United States and served as a secret agent, saboteur, and spy, and that petitioner, knowing of Herbert's mission, adhered to the enemy and gave it aid and comfort by maintaining and harboring Herbert; by meeting with and assisting Herbert in matters connected with Herbert's service to Germany; in his countenancing that service; in carrying out requests and instructions of Herbert in connection with that service; in purchasing an automobile for Herbert; in attempting to procure employment for Herbert; in furnishing false information regarding the identity and mission of Herbert; and in receiving, safeguarding, and concealing property and funds of Herbert. Twenty-

[2] Petitioner previously had been convicted of treason under another indictment which was predicated on the same acts, but the conviction was reversed by the Circuit Court of Appeals for the Seventh Circuit, principally because of the applicability of the *McNabb* doctrine, 318 U. S. 332, to the case. *United States* v. *Haupt*, 136 F. 2d 661.

nine overt acts were alleged to have been committed by petitioner with the intention of adhering to the enemy and giving it aid and comfort (I R. 7–15), but only twelve were submitted to the jury (see *infra*, pp. 9, 29).

Petitioner was tried before a jury and was found guilty (I R. 97); he was sentenced to imprisonment for the remainder of his life and to pay a fine of $10,000 (I R. 110).[3] Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed, one judge dissenting (II R. 10, 33).

We think that the majority opinion of the circuit court of appeals fairly sets forth the evidence in support of the conviction, but we shall, nonetheless, briefly summarize it with appropriate record references to aid the Court in passing on the questions posed by the petition for a writ of certiorari.

Petitioner is the father of Herbert Haupt, one of the eight saboteurs convicted by a military tribunal and who was thereafter executed. See *Ex parte Quirin*, 317 U. S. 1. Petitioner was born in Germany in 1894;[4] he married there; and

[3] In a memorandum opinion the trial judge stated that on the evidence adduced at the trial petitioner deserved a sentence of death, but that the life sentence was imposed in deference to a letter from the jury urging the court to be merciful to petitioner (I R. 112–113; see also, I R. 99).

[4] There was no dispute at the trial that petitioner is a naturalized citizen; his naturalization certificate was received in evidence as Government Exhibit 65 (R. 722).

his son Herbert was born of that marriage in Germany in 1919. He came to this country in 1923, his wife and son followed two years later, and thereafter they lived in or about Chicago, Illinois. (See R. 11–12, 47.) In the spring of 1939 the son, Herbert, obtained a job with the Simpson Optical Co. in Chicago, which is engaged in the manufacture of all kinds of lenses for instruments, including parts for the Norden bombsight (R. 341–343). The evidence summarized below shows that in the spring of 1941 Herbert left his home and job and with the aid of the German Consul in Mexico went to Japan and from there to Germany, where he entered the employ of the German Government and was trained for sabotage work in this country.

HERBERT'S ENEMY STATUS

The acts of treason charged against petitioner are predicated on the proposition, which was undisputed at the trial (see R. 44–46), that Herbert was an enemy agent. The Government established the enemy character of Herbert principally through the testimony of Ernest Peter Burger, one of Herbert's fellow saboteurs. Burger detailed (R. 58–192) the intensive training in sabotage that Herbert and his seven co-saboteurs received in Germany. Essentially, his testimony revealed the facts which are set forth in this Court's opinion in *Ex parte Quirin, supra*, 317 U. S. at 20–22, and for purposes of brevity we

shall not restate them here. Suffice it to say that before the eight saboteurs left Germany, they were instructed concerning their activities in this country. The general strategy was that each saboteur, after he had illicitly landed in the United States, should devote three or four months to establishing his identity. Each was to establish himself in a community and engage in the same work that he had previously been doing. (See R. 76–77, 111.)

Herbert's specific instructions were as follows:

1. To use his own name only in a vicinity or among people where he was known (R. 73);

2. Upon landing in the United States to proceed directly to Chicago (R. 73);

3. To procure an automobile for the use of his fellow saboteurs (R. 73); "the purpose for purchasing an automobile was to, first, remove our explosives from the place where they were caged, or hidden or buried, back to a place which in the meantime would be prepared. The second purpose for a car was to give us range for our operations" (R. 75);

4. "To procure information and details concerning the optical industry in Chicago, especially the Norden bombsight, and furnish us [the saboteurs] information * * * in order to equip us to carry out our assignments (R. 74);

5. To register under the Selective Training and Service Act (R. 74);

6. "To contact trustworthy political people and to deposit a certain amount of money with them as a contingent fund for our groups in case of emergency (R. 74);

7. To procure information "of the incendiary layout" and about "vital machines and parts" in the Simpson Optical Co. of Chicago (R. 83).

Before leaving Germany the saboteurs were divided into two groups, each one taking one-half of the United States for its operations. The witness Burger was in group 1 and Herbert was in group 2 (R. 78–80). The assignment sheet of group 1 stated that the group would receive its information concerning optical industries from Herbert, even though he was a member of group 2 (R. 79).

The saboteur group was fully equipped with necessary clothing and materials and with large sums of our money, and they came to this country by submarine (R. 87–109, 131–147). The evidence traced the landing of Herbert's group in Florida, the caching of their sabotage equipment on the beach, their temporary stay in Florida, and Herbert's ultimate arrival in Chicago (R. 192–202, 202–205, 207–216, 249–261, 263–267, 268–271, 274–277). Herbert carried $5,000 in $50 bills in a money belt and $400 in bills of smaller denominations and a zipper bag in which $10,000 was concealed (R. 91, 92, 121–122).

Upon his arrival in Chicago, Herbert immediately contacted his parents, and he lived with them until he was arrested. (See *infra*, pp. 13–19.) The overt acts charged against petitioner relate to the events which transpired from the time Herbert arrived in Chicago until he was taken into custody by the F. B. I. a week later.

THE OVERT ACTS SUBMITTED TO THE JURY[5]

The trial court submitted twelve of the twenty-nine overt acts alleged in the indictment (I R. 7–15) to the jury as possible overt acts of treason within the meaning of the Constitution. Generally stated, two of the overt acts (Nos. 10 and 11) charged that petitioner assisted Herbert in obtaining employment so that he might conceal his identity and mission; six (Nos. 12, 17, 20–23) charged that petitioner harbored Herbert for six successive days from June 22, 1942, to June 27, 1942, inclusive; four (Nos. 13–16) charged that petitioner accompanied and assisted Herbert in the purchase of an automobile. The evidence in support of these overt acts may be summarized as follows:

Overt Act. No. 10—Overt Act No. 10 charged that on June 22, 1942, petitioner accompanied Herbert to the home of one Andreas Conrad Grumau for the purpose of assisting Herbert in

[5] See *infra*, pp. 20–28, for a summary of evidence, other than that revealed by the overt acts submitted to the jury, showing petitioner's treasonable intent.

securing employment, so that he might conceal his identity and mission and so that he might pursue his mission.

Grunau testified that he was the superintendent of the Simpson Optical Manufacturing Company, which was engaged exclusively in war production during the war and which produced parts for the Norden bombsight (R. 341–342). He belonged with petitioner to a German singing society and he had known petitioner since 1937 (R. 343, 348). Herbert had worked for the Simpson firm from 1939 to 1941 (R. 344).

Grunau said that on the evening of June 22, 1942, he came home at about 8 o'clock and found Herbert and his parents waiting for him (R. 344). In response to his inquiry, Herbert, in the presence of petitioner, told Grunau that he had been in Mexico digging gold (R. 345). Herbert assured Grunau that he had registered under the Selective Training and Service Act (R. 345–346), and shortly thereafter, in the presence of his parents, Herbert asked Grunau for a job with the Simpson Optical Co. (R. 347). He was informed that he should come to the plant and fill out an application (R. 347). Herbert inquired whether he could obtain a draft deferment, and he was told that the matter would be handled by the "front office" (R. 347–348).

Mrs. Grunau testified (R. 353-360) that the Haupts came to her home by automobile sometime

after 7 o'clock in the evening. Herbert told her that he had come from Mexico and that he wanted to get his old job back. She corroborated her husband's testimony that when he came home the Haupts were waiting for him and that in the presence of his parents Herbert explained to Mr. Grunau that he had been in Mexico.

Edith McGowan, a daughter of the Grunaus, testified that she was in her parents' home when the Haupts came there and that petitioner was driving the automobile in which the Haupts came to their home (R. 361–367).[4]

Overt Act No. 11.—This overt act is of the same nature as the previous one, and names one Heinrich Koch as the person whom the Haupts visited in quest of a job for Herbert.

Koch testified (R. 368–373, 421–424) that he was a foreman for the Simpson Optical Company; that he knew petitioner; and that Herbert had worked in his department from 1939 to 1941. At 9:30 p. m. on June 22, 1942, petitioner, Herbert, and Mrs. Haupt came to his home. Herbert explained to Koch that he had been in Mexico and that he wanted to get back his job at the Simpson plant; that he wanted to work in defense work. When Koch questioned Herbert concerning his

[4] The testimony of the Grunaus was corroborated by the testimony of several F. B. I. agents who were surveilling Herbert and who observed petitioner, as well as Herbert and Mrs. Haupt, leave his home and drive to the Grunau residence (R. 706–708, 725–727, 740–742, 751–754, 770–771, 781–782).

draft age, petitioner said, "I sent him all this morning to the draft board and to the F. B. I." (R. 423). When Koch questioned Herbert about where he had been, saying that he thought he had been in Japan, Herbert said, in the presence of petitioner, "we was only a little bit sailing" (R. 423). Herbert also spoke to Koch about a draft deferment (R. 424). Mrs. Koch testified similarly that petitioner, Herbert, and Mrs. Haupt came to the Koch home "to see my husband on business" and that the business concerned a job for Herbert (R. 426–427).

The F. B. I. agents, who were trailing Herbert, testified that they observed the Haupts leave the Grunau residence and go by automobile, with petitioner driving, to the Koch residence, and that at the conclusion of the visit to the Koch home, petitioner drove Herbert and Mrs. Haupt to their home, and he then drove away (R. 708–709, 727–729, 771–773, 781–783).

Overt Acts Nos. 12, 17, 20–23.—Each of these overt acts charges in substantially the same terms that on a specified date petitioner "harbored and sheltered the said enemy Herbert Haupt at the home of Hans Max Haupt and Erna Haupt, 2234 N. Fremont St., Chicago, Illinois, well knowing that the said enemy was an agent of the Government of the German Reich in the United States to commit sabotage, act as a spy, and perform other services for said Government as aforesaid, all with the intent and for the purpose of assist-

ing said enemy Herbert Haupt in carrying out his mission as an agent of the Government of the German Reich as aforesaid."

Petitioner and his wife lived in a front apartment on the third floor of a building at 2234 North Fremont Street. The three-story building is owned by one Kluczyk, who was a witness. It consists of six apartments, three in the front half of the building and three in the rear. The three front apartments are not connected with the rear apartments in any way; the front apartments can be entered only through the front entrance to the building, and the rear apartments must be entered through an entrance at the rear of the building. Of the three front apartments, the Kluczyks lived on the first floor, the Probsts on the second floor, and the Haupts on the third floor. Both the Kluczyks and the Probsts testified to these facts and that Herbert at no time lived in their apartments. (R. 278–281, 312–314, 323–326, 327–328, 352–353.)

June 22, 1942.—From the testimony of never less than two F. B. I. agents, it appeared that surveillance of the Haupt residence was started at about 10:30 a. m., Monday, June 22, 1942, and continued until Herbert's arrest on June 27; that Herbert was first seen there on June 22 at approximately 12:25 p. m., when he alighted from a taxicab that had stopped in front of the building in which petitioner lived; that Herbert walked up the front steps of the building and into the

front entrance; and that he was observed leaving the front entrance of the building at 1:45 p. m. (R. 685–688, 691–693).

At 5:15 p. m. Herbert reentered the front door to the building in which the Haupts lived (R. 589, 693–694). At 7:30 p. m. that same evening, petitioner, accompanied by Herbert and Mrs. Haupt, were observed emerging from the front entrance. They entered petitioner's automobile, and Herbert drove the car around the corner, at which point petitioner took over the operation of the automobile. They were followed by the F. B. I. agents, as we have shown *supra*, pp. 11–12, to the homes of Grunau and Koch, and later in the evening they returned to the Haupt residence, Herbert and Mrs. Haupt going into the building and petitioner thereafter driving away. Shortly after Herbert and Mrs. Haupt entered the building, the lights in the Haupt apartment were extinguished. (R. 705–709, 725–729, 739–742, 751–755, 771–774, 781–783.)

Mrs. Kluczyk, the wife of the owner of the building, testified that Herbert had lived with his parents prior to the time he left the country; and that she did not see him again until about 11 a. m. on June 22, 1942, in front of the building. On the evening of June 22, Herbert, petitioner, and Mrs. Haupt stopped in the Kluczyk's apartment for a short visit before leaving the building. At that time Herbert stated, in the presence of petitioner, that he had been in Mexico, South America, and

"all over." (R. 282, 290–294; see also the similar testimony of two other witnesses, R. 313–322, 328–340.)[1]

June 23, 1942.—At 12:20 p. m. on June 23, Herbert and Mrs. Haupt were observed emerging from the front entrance to the building (R. 695). At 5:15 p. m. Herbert returned and entered the building (R. 697, 730, 810). At about 6:00 p. m. petitioner, Herbert, and Mrs. Haupt came out of the front entrance and proceeded in the Haupt automobile to a restaurant, where they remained for forty-five minutes. When they left the restaurant, Mrs. Haupt separated from the two men, and they proceeded to an automobile sales agency (see *infra*, p. 19). Petitioner and Herbert later drove to their home. Petitioner entered the building, but Herbert walked to a specified street corner. Petitioner came out of the building shortly thereafter and met Herbert at the corner. Both men shortly thereafter returned to the Haupt residence. (R. 698–702, 730–732, 784–789, 810–814.)

[1] Mrs. Kluczyk also testified that she had known the Haupt family for twelve years (R. 282); that Herbert left home in June 1941 (R. 283); that at a later date Mrs. Haupt showed her a telegram petitioner had received from Herbert in Tokyo (R. 285); that on December 7, 1941, in the presence of petitioner, Mrs. Haupt told her that they were sending a telegram to Herbert in Tokyo (R. 286–287); and that on June 9, 1942, Mrs. Haupt asked her to tell petitioner, when he returned to work, to come to his sister-in-law's house (where Herbert then was) (R. 289–290).

In the meantime, between 7:30 p. m. and 8:00 p. m., Gustave Zerner, a friend of petitioner's (R. 499–500, 502), arrived at the Haupt apartment (R. 503). Shortly after he entered, Herbert and petitioner also entered together (R. 504). Mrs. Haupt had supper waiting for petitioner and Herbert, so Zerner remained in the parlor while the three Haupts ate in the kitchen (R. 506–507). Meanwhile Mrs. Saure (at that time Miss Melind, a friend of Herbert's) had also come to the Haupt apartment (R. 507). When the meal was completed Zerner joined the elder Haupts in the kitchen and Herbert joined Mrs. Saure in the parlor (R. 507–508).

At about 10 or 10:30 p. m., Herbert and Mrs. Saure left the Haupt apartment (R. 491, 789, 814, 823). They proceeded in the Haupt automobile to a tavern. Later, Herbert drove Mrs. Saure to her home and then returned to the Haupt building (R. 703, 733, 824). As on the previous evening, within a few minutes after Herbert entered the building the lights in the Haupt apartment were extinguished (R. 834).

June 21, 1942.—At 7:00 a. m. on this date, petitioner emerged from the apartment building and drove off in his automobile, which Herbert had parked in front of the building when he returned home the previous evening (R. 735). Shortly after noon, two witnesses who were in the Kluczyk apartment on the first floor heard Herbert and Mrs. Haupt come down the stairs from

the Haupt apartment (R. 295, 335–336). Herbert waited in front of the building for a taxicab and drove off in it (R. 736, 815). At 5:30 p. m. Herbert returned and was observed entering the front entrance of the building (R. 757). At 6:00 p. m. petitioner and Herbert came out of the building and entered petitioner's automobile and drove to an automobile agency (see *infra*, p. 17) (R. 743). Shortly thereafter, Herbert was observed driving away from the automobile agency with a newly acquired Pontiac automobile (R. 744). He arrived at the apartment building at 6:35 p. m. and was observed entering the front door of the building (R. 744, 760). Ten minutes later he left the building and drove to two places, returning at 9:15 p. m. He did not enter the building, but drove off again and returned at 1:00 a. m., June 25 (R. 744–746, 760–762). Shortly after Herbert entered the building the lights in the Haupt apartment were extinguished (R. 710–711, 768–769).

June 25, 1942.—At 7:00 a. m., petitioner was seen to emerge from the front entrance to the building. He stood in front of the building, talking to one Carl Eggert, who was waiting for him. While they were conversing, Herbert was also observed coming out the front door (R. 774–775, 597–598). He drove away in his newly acquired Pontiac automobile, and returned to the Haupt building at 4:20 p. m. (R. 736, 747, 777). He left the building at 6:45 p. m., wearing different

clothing than he had on when he entered (R. 777). He returned at midnight, and, a few minutes after he entered the building, the lights in the Haupt apartment were extinguished (R. 825, 833).

June 26, 1942.—At 7:00 a. m. petitioner was seen leaving the apartment building, and at 9:00 a. m. Herbert came out dressed in different clothing than that which he wore when he entered the building the previous night (R. 826, 830, 835). At 5:00 p. m., petitioner returned, and at 6:00 p. m. Herbert returned, both of them entering the building through the front door (R. 778–779, 817). At 7:15 p. m., petitioner left the premises, and at 8:00 p. m. Herbert and Mrs. Haupt were seen leaving the building (R. 779). Herbert returned at 1:50 a. m., at which time he drove up in front of the Haupt home, parked the Pontiac coupe, sat in front of the residence, talked with another young man, and then entered the building (R. 737–738, 747, 818). When Herbert entered the building the lights in the Haupt apartment were not on; they were put on a few minutes later and were extinguished in about ten minutes (R. 828).

June 27, 1942.—As we have shown above, Herbert entered the Haupt building at 1:50 a. m. At 9:05 a. m. he emerged from the building, got into his car, and drove for a few blocks. At this point the FBI agents stopped him and placed him under arrest. (R. 689–690, 738, 747–748, 805–806, 818, 829.)

Overt Acts Nos. 13–16.—These overt acts relate to petitioner's acquisition of a Pontiac automobile for Herbert; they charged that petitioner accompanied Herbert on June 23 and 24 to the Warner Motor Sales Company to arrange for the purchase of an automobile for Herbert and that petitioner signed a financial statement, ordered the car, made an initial down payment on the purchase price, thereafter made a further payment, and completed arrangements for, and did purchase, an automobile for Herbert for the purpose of assisting him in carrying out his mission as an agent of the German Reich.

On the evening of Tuesday, June 23, after having supper with Mrs. Haupt and Herbert at a restaurant (*supra*, p. 15), petitioner drove Herbert to the Warner Motor Sales Company in Chicago (R. 699, 731, 786, 812). They entered the showroom, and petitioner told Farrell, a salesman, that he wanted to buy a good used late-model car (R. 453–454). Petitioner selected a 1941 model Pontiac automobile and inquired if he could purchase it on the installment plan. In response to the salesman's inquiry whether he had a car to trade in, petitioner said that he had a car, but he did not intend to trade it in; that the new car was for Herbert (R. 454–455). Petitioner paid a $10 deposit on the purchase price of $1,045 and said that he would come in the next day to make a further payment. Petitioner furnished financial references and signed an order for the car (R.

454–457). During the course of the negotiations, Vinson, the manager, came in and participated in the transaction (R. 457, 470–474). Both Farrell and Vinson testified as to these events.

On the following evening petitioner and Herbert again went to the Warner Motor Sales Company, and petitioner made an additional payment of $405 on the purchase price. Petitioner signed a note for the balance due and executed the usual finance contract (R. 461, 464). The bill of sale was made out to petitioner (Gov. Ex. No. 55). The car was delivered to Herbert, and he drove it away from the sales agency (R. 743). Farrell's testimony to this effect was corroborated by that of Vinson, who testified that he saw petitioner and Herbert come in and that he received the money petitioner paid and the note which petitioner signed (R. 476–477).

Petitioner's Knowledge of Herbert's Enemy Status and His Intent to Betray

To a large degree the Government relied upon petitioner's admissions and other declarations to show that he was aware of Herbert's role as an enemy agent and that he cooperated with Herbert to enable him to carry out his mission. The circumstances under which such statements were made and their nature may be summarized as follows:[8]

[8] The jury was instructed that this evidence should be considered only on the issue of treasonable intent (R. 1596–1597).

1. Petitioner was arraigned before a United States Commissioner on July 21, 1942. He was advised of the charge against him; he pleaded not guilty; and the matter was then continued before the Commissioner until August 5. (R. 655, 673.) Shortly before noon on August 5, petitioner was present in the "cell room" of the Marshal's office preparatory to further proceedings before the Commissioner at 2:00 p. m. (R. 655–656). Petitioner summoned the Marshal and said he wanted to talk to an F. B. I. agent (R. 656). In compliance with petitioner's request, two F. B. I. agents were summoned, and they talked with petitioner in a private room in the Marshal's office (R. 656–657, 663–664, 675). Petitioner volunteered some information, and the remainder was obtained in answer to questions posed by one of the F. B. I. agents (R. 670).

Petitioner told the agents, at the opening of the interview, that "he was very mad at Otto Wergin* and his wife, because he blamed the predicament of his son on them, and he wanted to testify in court against them" (R. 665, 675).

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* Wergin and his wife subsequently were jointly indicted for treason with petitioner and Mrs. Haupt and with Walter Froehling and his wife. They were all convicted, but the convictions were reversed upon appeal. See *United States* v. *Haupt*, 136 F. 2d 661 (C. C. A. 7). According to the Department's records, Wergin and Froehling subsequently pleaded guilty to misprision of treason, in violation of Section 3 of the Criminal Code (18 U. S. C. 3) and each was sentenced to imprisonment for five years.

Petitioner then said that on Saturday, June 20, 1942, he, Mrs. Haupt, and Herbert visited the Wergin home and that at that time Herbert told a complete story of his trip to Mexico; how he contacted the German Consul and obtained passage to Japan; how thereafter he ran the British blockade and landed in France and ultimately reached Germany. Petitioner said that Herbert told them that he had been in an "Intelligence School" and that "he had a huge sum of money to use in connection with that over here." Herbert also told of his return to the United States by submarine.[10] (R. 665–666, 675–676.)

Petitioner further told the F. B. I. agents that on Friday night, June 19, 1942, he and his wife were present at the Froehling[11] home where Herbert also related his experience after leaving Chicago (R. 667, 676). According to petitioner's statement to the agents, the Wergins and Haupts were present at the Froehling home on Sunday, June 21, 1942, and Herbert again discussed his trip to Japan and Germany, the intelligence school, and his return to this country by German submarine. They became apprehensive that other people in the building might overhear them, so the Haupts and Wergins left the Froehling home and went to the Haupt's apartment, where "again

[10] Petitioner said that at this time Wergin offered his services to Herbert "because he could use some of the money" Herbert had (R. 666–667).

[11] Herbert was Mrs. Froehling's nephew. See 136 F. 2d 661.

Herbie Haupt discussed his story." Petitioner advised the F. B. I. agents that it was because the Wergins encouraged Herbert to carry out his mission that he wanted to testify against them in court. (R. 667–668.)

Petitioner further told the agents that on the following Saturday night, June 27 (the day on which Herbert was arrested), the Froehlings, the Wergins, and petitioner and Mrs. Haupt were together in the Haupt apartment, and that "because Herbie had not shown up all day, they became rather fearful that something had happened to him, and at that time they all * * * decided that if anything had happened to Herbie, or if they were questioned, they would all tell the same story, that they knew nothing about his activities, except the fact that he had gone to Mexico." (R. 668, 677.)

2. The witnesses Majerczak (R. 882–969) and Hamby (R. 970–1011) were confined in the Cook County, Illinois, jail at the same time that petitioner was there (R. 884, 974–975).[12] Beginning on July 21, 1942, they talked with petitioner concerning his case and concerning their own cases (R. 886–891, 978). They testified that it was after petitioner learned from a newspaper that Herbert

[12] Both witnesses were in custody under state charges, and both have since been convicted and sentenced to life imprisonment in the state prison, where they are presently confined (R. 883, 970–971, 973).

had been executed that he began talking of him and his activities (R. 891–893, 978–979). In the course of the various conversations, petitioner said that he had been arrested because Herbert had given him United States money which Herbert obtained in Germany (R. 889, 901, 981–982); that Herbert had originally gone to Germany to join the German Army, with petitioner's approval (R. 893–894, 982–983); that about a year after Herbert left, petitioner was summoned to the Froehling's home and Herbert was waiting for him there (R. 894, 901, 983); that Herbert told him of his training in Germany and of his mission in this country (R. 895–897, 899, 983–985, 986); that he promised to assist Herbert as much as he could (R. 985); that Herbert gave him $1,000 with which to purchase an automobile for him, and that he purchased an automobile for Herbert (R. 901, 904, 905, 985); that he received other money from Herbert for safekeeping, which he hid under a rug (R. 902, 903, 985); that Herbert told him that he wanted to obtain a job with "the Optical Company," so that he could obtain information in respect of "some kind of a sight" (R. 990); that petitioner did not advise the Government authorities of Herbert's mission because "his son was his own flesh and blood and after all he was helping the fatherland" (R. 988); and that at the conclusion of the war, he intended to return to Germany (R. 907).

3. Gustave Zermer, a friend of petitioner's (R.

502), testified that he was present in the Haupt apartment on June 23, 1942 (see *supra*, p. 16), and that at that time petitioner told Zermer that Herbert would be "travelling around," and that he wanted to "use my address for mail" (R. 511). Petitioner suggested that Herbert's mail would be sent to Zermer's address and that Zermer should bring it to petitioner (R. 510–511, 519–521). Zermer agreed to the arrangement (R. 520–521). Zermer also testified that petitioner inquired whether Herbert could obtain living accommodations in the house where Zermer lived; that petitioner said that "he was afraid to have Herbert around the house" (R. 517).

4. Carl Eggert, a friend and employee of petitioner's (R. 591–594), testified that he met petitioner at a tavern on Sunday, June 28, 1942 (the day following Herbert's apprehension), and that petitioner paid a debt owed to him by giving him two fifty dollar bills (R. 599–601).[13] After they had been in the tavern a few minutes petitioner summoned Eggert into a back room and in a voice "just so I could understand it," petitioner said, "Carl, I have $900 of my own money. You can do me a favor and keep it for me. Then I am afraid now the F. B. I. comes in my home and takes it away." (R. 601.) Eggert agreed to keep the money for petitioner (R. 602). About three-quarters of an hour later petitioner ap-

[13] Burger testified that Herbert had $5,000 in fifty dollar bills in a money belt (see *supra*, p. 8).

peared at Eggert's home and gave him a closed envelope, which Eggert subsequently learned contained eighteen fifty dollar bills.

5. In addition to the evidence detailed above, the Government adduced the testimony of three witnesses which was concerned exclusively with statements made by petitioner commencing in 1936 which showed that he was more favorably disposed to Nazi Germany than he was to the United States. This testimony was also restricted to the issue of treasonable intent (R. 845, 874, 1024, 1595–1596).

Schroeder, a friend and fellow worker of petitioner's (R. 840–842), testified that in 1936 and 1937 petitioner told him that he liked Hitler very much (R. 846) and that "we needed a man like Hitler here to rule the country like it was built up over there * * *" (R. 847); that at a meeting of the German World War Veterans in 1939 he had opposed the sending of money to Germany because Hitler might use it for the purchase of armaments, and that petitioner came to him after the meeting and told him "that I am not a good German" and that "I should be ashamed of myself" (R. 856–857). Some time after Mrs. Haupt had visited Germany and after the German invasion of Poland and France, petitioner told Schroeder that he would kill Herbert himself before he would send him over to Germany to fight against Germany (R. 862).

Mrs. Fishman testified that in 1940 petitioner and Mrs. Haupt worked for her "as a couple" and that they and Herbert lived on her premises (R. 867–868); that petitioner told her that on weekends Herbert attended a Bund camp at Ludington, Michigan (R. 868–869); that petitioner said that "they would go up there and train; it was the proper thing for German people who were real Germans to send their children there and raise them like that" (R. 869–870); that in May 1940, petitioner said, "Hitler was a God-send to the German people" (R. 875); that "if we entered war against Germany we would have a revolution in this country like they had there after the last war; that we have German organizations back here that would take our armories over, our electrical companies, our telephone companies; that the same thing would happen to us as happened in Norway and France, that we would be taken from within by Fifth Column activities" (R. 875–876, 878); and that this would be done by the German organizations to which he belonged (R. 879).

Hans Poppe testified that he had known petitioner since 1936 (R. 1023–1025) and that they had worked together from 1937 to 1939 (R. 1026); that on several occasions in 1939, petitioner told him that he took Herbert and other boys to a Bund camp in Michigan (R. 1028); that petitioner said in 1939 that "if war would break out

with the United States and Germany, he would never permit his boy to join the American Army. He would send him to Mexico, and from there he would go to Germany and join the air force" (R. 1029); that petitioner said further that if this country should "take him in the Army, he would crawl over the enemy lines and tell them our position" (R. 1029); and that petitioner said in 1939 that "he had no feeling for the United States at all. His feelings were only for Germany, and he wished Hitler would come over here and drive all the Jews out, because the Jews are running this country" (R. 1030).

ARGUMENT

As we understand petitioner's position, he does not dispute the fact that Herbert was an enemy agent or that there is sufficient proof from which the jury could have found that petitioner knew of Herbert's enemy status and that he nevertheless assisted him in the performance of his mission. The trial judge was "convinced that Hans Max Haupt traitorously adhered to the enemies of the United States and gave them aid and comfort" and that "no other verdict than that rendered was reasonably possible" (I R. 112). The basic issues, as framed by petition for a writ of certiorari, relate to the sufficiency of the proof of the overt acts submitted to the jury and to asserted trial errors, particularly in the admission of evidence and in the instructions to the jury.

I

Twelve overt acts were submitted to the jury as possible acts of treason,[14] but the verdict in the case was a general one of guilty, without special findings as to the acts upon which it rests (I R. 97). Since, as in *Cramer* v. *United States*, 325 U. S. 1, 36, it is not possible to identify the particular overt act or acts upon which the jury relied in convicting petitioner, that to sustain the verdict the Government is obliged to support each of the twelve overt acts which were submitted to the jury. Contrary to the position of the dissenting judge below, this view bears no relation to the question whether the trial judge properly instructed the jury that it was to find petitioner guilty if it found that he committed any one of the overt acts submitted. The propriety of this instruction will be discussed *infra* at pp. 38–42. It is only because the jury's general verdict does not

[14] In respect of all of the overt acts, we think that the father-son relationship between petitioner and Herbert is immaterial either to the treasonable character of the acts or to the sufficiency of proof of these acts. It is material solely on the intent issue, *i. e.*, whether petitioner assisted Herbert only because he was his son or whether he assisted Herbert with knowledge that Herbert was an agent of the German Reich and with a desire to aid the enemy. The trial judge specifically instructed the jury that "if you are not satisfied beyond a reasonable doubt that the defendant intended to aid and comfort the enemies of the United States the defendant must be found not guilty" (R. 1579–1580; see also, R. 1578–1579, 1592–1594).

permit the ascertainment of the overt act or acts it relied upon that we would be required. under the rule just stated, to sustain all of the overt acts submitted to the jury.

1. *The Harboring and Sheltering Overt Acts.*—Petitioner does not deny that at the times specified in overt acts Nos. 12, 20, 21, 22, and 23 Herbert lived in petitioner's home, ate meals there and in general resumed the same relationship to the home as existed prior to Herbert's departure for Germany in 1941. And we do not understand petitioner seriously to contend that furnishing food and a place to live to an enemy agent knowing that he is such an agent is not capable of being an overt act of treason within the meaning of the Constitution and the *Cramer* decision.[15] Rather, petitioner's sole contention (Pet. 25–28) in respect of the harboring and sheltering acts, with one exception,[16] is that they were not proved by direct testimony of two witnesses. In his view

[15] In the *Cramer* decision the Court demonstrated the weakness of the proof relating to the overt acts in that case by pointing out that "Cramer furnished them no shelter, nothing that can be called sustenance or supplies," 325 U. S. at p. 37. In this case petitioner does not deny that he furnished both shelter and sustenance for Herbert, who petitioner knew was an enemy agent.

[16] Petitioner does not challenge the sufficiency of the proof to support overt act No. 17, which charged harboring on June 23, 1942, apparently because, in addition to the testimony of the F. B. I. agents, the witnesses Zermer and Saure testified that they were present in the Haupt apartment on that day and that Herbert was also there (see *supra*, p. 16).

the evidence which we have summarized, *supra*, pp. 13–18, in support of these overt acts is all circumstantial evidence which is inadequate to support the overt acts. We think the testimony concerning the acts which the witnesses directly observed demonstrates beyond any doubt that petitioner sheltered and harbored Herbert in his home.

It appeared at the trial that at all times involved in the overt acts in question, Herbert and the Haupt home were under surveillance by agents of the Federal Bureau of Investigation. By the direct testimony of two or more witnesses who lived in the building it was established that petitioner and his wife lived in the third floor front apartment at 2234 N. Fremont Street, Chicago, Illinois, and that the sole entrance to the apartment was through the front entrance to the building. These same witnesses testified that they lived in the only other two apartments which could be reached through the front door and that at no time did Herbert reside in their apartments. See *supra*, p. 13. By the direct testimony of two or more F. B. I. agents it was established that on each of the days in question Herbert on numerous occasions entered and left the building; that when he entered late in the evening the lights in the third floor front apartment were extinguished within a few minutes and that he did not leave

the building until the following day; that he always returned to the building at the close of the day; that on several occasions Herbert entered the building wearing described clothing and that when he thereafter left the building he was wearing other clothing; that on numerous specified occasions Herbert entered and left the building in company with both or one of his parents; and that on specified occasions Herbert accompanied petitioner and Mrs. Haupt from the Haupt home to the homes of their friends.

This testimony, always by at least two witnesses, concerning acts which they directly observed, in our view compels the conclusion, which petitioner does not deny, that Herbert at the times in question was living with petitioner in petitioner's apartment. The testimony does not reasonably permit any other conclusion. As we understand petitioner's view, the proof would have been adequate only if the witnesses had testified that they were present in the Haupt apartment and that they observed petitioner furnish food to Herbert and that they saw Herbert sleep in petitioner's bed; in other words, that acts of harboring and sheltering are for all practical purposes incapable of being satisfactorily proved in a treason case. For rarely, if ever, is such evidence available. In so far as probative value is concerned, we think the line between the evidence which the Government relies upon and the evidence which petitioner urges is necessary is an

imperceptible one. In both instances the same conclusion—that petitioner harbored and sheltered Herbert—necessarily follows from the evidence. We submit that the two witnesses' evidence which we have summarized in the statement, *supra*, pp. 13–18 amply sustains the allegations of the overt acts in question.[17]

2. *Overt Act No. 16; the purchase of an automobile.*—Petitioner does not seriously challenging the sufficiency of this act as an act of treason,[18] but he urges that it is supported by the direct testimony of only one witness. Overt act 16 charged that while at the Warner Motor Sales Company on June 24, 1942, petitioner made a payment in cash on the purchase price of an automobile for Herbert "and completed arrangements for the purchase of said automobile and did purchase said automobile" for Herbert with treasonable intent.

Petitioner agrees that the testimony of the salesman, Farrell (*supra*, p. 20), that petitioner

[17] Particularly in view of the testimony of both the Kluczyks and the Probsts (*supra*, p. 13) that petitioner regularly lived with Mrs. Haupt in the third floor front apartment, we are unable to agree with petitioner (Pet. 25) that the proof was inadequate to show petitioner's connection with the harboring and sheltering of Herbert.

[18] In the light of Burger's testimony (*supra*, p. 7) that Herbert was ordered by the German Government to procure an automobile for the saboteurs, there can be no serious question that petitioner's acts in procuring an automobile for Herbert, with knowledge of Herbert's mission, were not colorless acts.

and Herbert came to the salesroom on June 24 and that petitioner paid $405 on the purchase price, signed a note for the balance,[19] and took delivery of the automobile, is sufficient one witness testimony in support of the overt act. He challenges the sufficiency of the testimony of Vinson, the sales manager.

Vinson testified, concerning the events of June 24, 1942, that he saw petitioner and Herbert enter the sales agency at 7 or 7:30 p. m.; that the money and note which petitioner gave Farrell as payment on the purchase price were received by him at that time; that the note was signed by petitioner; and that he saw the invoice of the sale which was made on the evening of June 24, 1942 (R. 477–479).

Petitioner urges, somewhat hypercritically, we think, that Vinson did not testify that he saw petitioner pay the money which Farrell said he received from petitioner. But Vinson did testify that he received the money and note at that time, and he itemized the denominations of the currency which he received and that itemization corresponded with Farrell's testimony concerning

[19] Petitioner suggests (Pet. 29) that the note was signed on the previous day. The testimony of Farrell, however, was that on "that day," (June 24) (R. 460) the note was signed. Since the $405 was paid on June 24, it is likely that the note was signed at that time when the balance due was ascertainable, and not on the previous day, when the down payment had not yet been fully made. (See also, R. 477.)

the denominations of the currency which he received from petitioner (see R. 460 and 478). Coupled with Vinson's testimony that he saw petitioner in the sales agency at the time of the transaction, we think that Vinson was a direct witness to the automobile transaction charged in overt act No. 16.

Petitioner also urges (Pet. 30) that Farrell was the only direct witness to the fact that the car was purchased for Herbert, as was alleged in the overt act.[2] He has overlooked, however, the testimony of the witness Robe, an F. B. I. agent, that he observed petitioner and Herbert drive to the sales agency in petitioner's automobile (R. 743); that "I saw Herbert Haupt leave the Warner Motor Sales, driving the 1941 Pontiac coupe," which had just been purchased (R. 743–744; see also, R. 759); and that he observed Herbert driving to and from specified places in that automobile during the few days prior to his arrest (R. 743–748; see also, R. 759–762). This evidence that Herbert assumed dominion over the automobile immediately upon completion of the purchase and that he had the car until he was apprehended, adequately shows, together with Farrell's testimony, that the automobile was ac-

[2] In his defense, petitioner offered evidence that he purchased the automobile for Herbert to replace one that Herbert had left behind when he went to Germany (see R. 1114–1115).

quired for Herbert, or so at least the jury was entitled to find.[21]

3. *Overt acts Nos. 10 and 11; assisting Herbert in securing reemployment in the Simpson Optical Plant.*—In petitioner's view (Pet. 30–31), "no witness whatever offered any proof that the defendant assisted or attempted to assist Herbert Haupt to secure" employment at the Simpson plant.[22] We have summarized the evidence in support of these overt acts at pp. 10–12, *supra*. Briefly, the evidence shows that within a few days after Herbert returned to Chicago, petitioner drove him to the homes of two long-standing friends who were officials of the Simpson Optical Company, and that he was present while Herbert falsely explained his absence to those men and asked for a job at the Simpson plant.

It well may have been that Herbert would have been able to secure a job at the Simpson plant without the assistance of petitioner. But the fact is that he evidently thought that petitioner's ac-

[21] Our view assumes that different direct witnesses may be relied upon in support of parts of the overt act alleged; that so long as two witnesses testify as to all material parts of the overt act the constitutional requirement is satisfied.

[22] In the light of the evidence showing that Herbert's instructions from the German Government were "to procure information concerning the optical industry in Chicago, especially the Norden bombsight" (*supra*, p. 7), there can be no serious question that petitioner, who was familiar with Herbert's enemy status, was engaged in more than a colorless act when he accompanied Herbert to the homes of officials of the Simpson firm in quest of a job.

companying him to the homes of petitioner's friends would be helpful to him. For in the usual course of events, fathers who accompany their sons to the homes of prospective employers in search of a job do so in order to lend moral support and to add weight to the application. There is no evidence in the case that petitioner accompanied Herbert for any other purpose.

There can be no question that petitioner's presence at the homes of Grunau and Koch was helpful to Herbert. While Herbert falsely explained to petitioner's friends that he had been in Mexico digging gold, petitioner, who knew better, remained discreetly silent. Plainly, neither Grunau nor Koch would have considered giving Herbert a job if they had known he was an enemy agent who had a mission to perform at the Simpson plant. They would have known that if petitioner had not remained silent. Petitioner's silence at a time when he should have spoken up and told his friends that Herbert's story was untrue was, of course, strong confirmation of Herbert's explanation that he had been digging gold in Mexico. Assistance may very well consist of silence, where there is a duty to speak. Petitioner's presence in the homes of his friends and his silent support of Herbert were of real assistance to any enemy agent who was at that very moment engaged in fulfilling his mission for the German Government. Not only did it confirm Herbert's false story, but it also lent an air of respectability to a hostile

mission. Certainly it was not neutral conduct.

The evidence in this respect was testified to by never less than two direct witnesses, and was, we think, adequate to support overt acts Nos. 10 and 11.

4. *Instructions 50 and 51; the Government's position in the courts below.*—In instructing the jury concerning the overt acts which were submitted to it, the trial judge charged that "It is not necessary for the government to prove by two witnesses the performance of more than one of the submitted overt acts, providing, of course, the other elements of the alleged crime are proven beyond a reasonable doubt as heretofore defined in these instructions" (Instruction 51, R. 1591).[23] Petitioner adopts the position of Judge Major,

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[23] Instruction 50 (R. 1590–1591) was as follows:

"If you believe from the evidence beyond a reasonable doubt that Herbert Haupt, as alleged in the indictment, was an enemy agent, spy, or saboteur, and that he came into the United States on a mission for the German Reich and was acting as such agent, spy, or saboteur on such mission while here, and that the defendant, Hans Max Haupt, knowing that he was such agent, spy, or saboteur, unlawfully, feloniously, maliciously, intentionally, traitorously, and treasonably and with treasonable intent as hereinbefore defined did adhere to and give aid and comfort to the said Herbert Haupt as an enemy, all as alleged in the indictment, and that in furtherance of or in carrying out said alleged adherence and giving of aid and comfort, Hans Max Haupt with treasonable intent performed any one of the above alleged overt acts submitted to your consideration and that two direct witnesses have testified to such act, then you may find the defendant guilty. Otherwise, you must find the defendant not guilty."

dissenting in the court below, in respect of this instruction (Pet. 31–34), that the jury should have been instructed that to convict it must find that petitioner performed all twelve of the overt acts which were submitted to it. Judge Major thought that the Government has, in effect, recognized this to be true because, on the appeal, it undertook to sustain all twelve of the overt acts. Consistently with the position of the United States Attorney in the court below, we think Judge Major is mistaken and that the trial judge's instructions are correct.

As we understand Judge Major's opinions, he has failed to distinguish between the doctrine of *Stromberg* v. *California*, 283 U. S. 359, 368, and the elements of the offense of treason which the jury was required to find. In the *Stromberg* case, the Court held that where the case was submitted to the jury as permitting conviction under any one or all of three clauses of a statute, and where it was impossible to determine from the jury's general verdict upon which clause the conviction rested, the conviction could not be upheld unless all three clauses were found valid. The same principle was applied in the *Cramer* case (325 U. S. at 36). That doctrine, of course, rests upon the proposition that the appellate courts will not speculate as to which of several possible bases the jury relied upon in reaching its verdict. Accordingly, when the verdict is a general one, the Government must under that

doctrine sustain each of the alternative bases in order to sustain the conviction on appeal. Nothing in the doctrine of the *Stromberg* case relates to the constituent elements of any particular offense or to the propriety of instructions to a jury. It is in this respect that we think Judge Major's position is unsupportable.

Judge Major points out that the Government's position in the trial court was that, in addition to the other elements of the offense, the jury was required to find that petitioner committed at least one overt act and that it was witnessed by two persons and that the trial judge so instructed the jury. Yet on appeal, he argues, the Government conceded that to sustain the conviction, it was obliged to sustain all twelve of the overt acts submitted to the jury. Accordingly, the dissenting opinion concludes (152 F. 2d at 807) that "the Government tried the case on one theory and presented it to this court on another" and that the instructions to the jury were erroneous.

It was the Government's position in the trial court and in the circuit court of appeals, and it is our position in this Court, that the Constitution requires that only one overt act need be established by two witnesses and that the trial judge therefore properly instructed the jury that on this phase of the case it was required to find that petitioner committed any one of the twelve overt acts submitted to the jury before it could convict

petitioner. It is true that in the circuit court of appeals the United States Attorney conceded that unless all twelve overt acts are supported by the requisite testimony, the conviction should be reversed. He took this position, however, only because there was no basis for ascertaining from the general verdict of guilty which overt act or acts the jury relied upon in convicting petitioner. We perceive no inconsistency between his position in the trial court and his position on the appeal. If the jury had made special findings as to each overt act, his concession would have been unnecessary. The prosecution would then be required to sustain only one of the overt acts upon which the jury relied, as revealed by its special findings.

Judge Major's view that the instructions to the jury should have required the jury to find for the Government on every overt act which was submitted to it rests upon his interpretation of footnote 45 of the *Cramer* opinion (325 U. S. at 36); he relies particularly upon the language that "the verdict must be set aside if any of the separable acts submitted was insufficient." (See 152 F. 2d at 805.) But the language which precedes the quoted words makes plain the fact that in no sense was the propriety of the instructions to the jury involved. Mr. Justice Jackson, speaking for the Court, explained that because the jury had not made special findings, it was impossible to identify the overt act upon which Cramer was con-

victed, and it was only for this reason that the Court said that the verdict must be set aside if any of the overt acts could not be supported. Significantly, the trial court in the *Cramer* case also instructed the jury that it need only find one overt act to convict (See R. 441–442, No. 13, 1944 Term). Nothing in the *Cramer* decision suggests that this instruction was erroneous.

Judge Major, in effect, concedes that if, in addition to the other elements of the offense, only one overt act had been submitted to the jury as a possible act of treason, all of the elements of the treason offense would have been properly submitted and a conviction could be sustained (152 F. 2d at 806). We do not understand how the elements of the offense of treason, which the jury was required to find to convict, are changed by the fact that more than one overt act was submitted to the jury as a possible overt act of treason. Accordingly, we submit that the trial judge's instructions on this phase of the case are unassailable.[24]

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[24] Petitioner's reliance (Pet. 33–34) on *Bollenbach* v. *United States*, No. 41, decided January 28, 1946, is misplaced. There is no equivocal jury instruction in this case, and the circuit court of appeals has not affirmed a conviction because guilt was evident from the record, even though the defendant did not have the kind of trial to which he was entitled. In testing the validity of the overt acts and the proof in support of them, the circuit court of appeals performed precisely the same function that this Court performed in the *Cramer* case.

II

Petitioner also contends (Pet. 34–41) that he was convicted on the basis of incompetent evidence. He challenges (1) the use on the issue of intent of his pre-war statements showing an intense devotion to Hitler and Nazi Germany; (2) the use on the issue of intent of one witness testimony concerning overt acts which were not submitted to the jury; (3) the use on the issue of intent of petitioner's extra-judicial admissions; and (4) the use of Burger's testimony and exhibits to show that Herbert was an enemy-agent.

1. Notwithstanding the fact that in his defense petitioner introduced testimony of a pre-war statement with a view to showing the absence of any pre-disposition to disloyalty to the United States (see R. 1103–1106), petitioner urges (Pet. 35) that prejudicial error resulted from the admission in evidence of the testimony of four witnesses concerning his pre-war statements, limited solely to the issue of treasonable intent. When it is recognized that the Government was obliged to prove petitioner's adherence to the enemy and that the statements were received with proper cautionary instructions to the jury, we think petitioner's argument must fail.

The evidence of petitioner's pre-war statements is summarized in the Statement, *supra*, pp. 26–28. It involves a few statements in 1936 and 1937 and more in the years immediately preceding the war.

The statements were not of the refusal-to-buy-war-bonds character, as in the Cramer case. They were statements of adulation for Hitler and Nazi Germany; they were statements of petitioner's proposed conduct in the event the United States went to war against Germany; and they were statements of what the German organizations to which he belonged would do along the lines of fifth column activity in the event of a war between the United States and Germany. At the time the testimony was admitted the trial judge instructed the jury that the statements were restricted solely to the issue of intent (R. 845, 874, 1024) and he so instructed the jury at the close of the case.[25]

[25] The trial judge's careful instructions to the jury in this respect were as follows (R. 1595–1596):

"58. There has been some testimony of certain statements purportedly made by the defendant prior to our declaration of war with Germany. Such statements of the defendant, if you believe they were made, are not grounds for charging the defendant with treason. The defendant, as well as others, had the right to his opinions and he had a right to express his opinions and to do anything lawful in keeping with those opinions and sympathies, but those statements, if you believe any were made, may be borne in mind by you in determining what his intent may have been after this country was at war with Germany, in committing, if you find beyond a reasonable doubt that he did so commit, any of the various overt acts charged in the indictment and submitted to your consideration by the court in these instructions.

"59. No law of the United States is violated when a person in a general discussion expresses favorable or adverse opin-

We agree with petitioner (Pet. 35) that none of this testimony was relevant to the establishment of the overt acts alleged in the indictment. Indeed, as we have shown, it was received in evidence solely on the issue of intent. On that issue, the statements were, we think, appropriate background evidence which reflected the setting in which petitioner acted in June 1942. It was important evidence in showing that petitioner was doing more than helping out his son; that he assisted Herbert, as petitioner stated at a later time, because "after all he was helping the fatherland" (R. 988). The short answer to petitioner's claim that the evidence of his statements was of a prejudicial nature is that all evidence of treasonable intent or a pre-disposition to commit treason is prejudicial to the defendant; otherwise it would not be offered. The Federal courts have long recognized the admissibility of such evidence in

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ions as to members of any race, color, or creed, or regarding any nationality.

"60. The court has permitted the Government to introduce into evidence in this case certain alleged statements or utterances purportedly made by the defendant prior to the events forming the basis of the indictment in this case. Such statements or utterances, if you believe they were made by the defendant, do not constitute evidence of the commission either of the treason alleged or of the commission of any alleged overt act, but may be considered by you, if you credit them, solely in determining the intent or state of mind of the defendant in performing, if you find he did perform, any alleged overt act or acts of treason charged in the indictment to have been committed by him, and submitted to your consideration in these instructions."

prosecutions where the defendant's state of mind is of crucial significance.[26] For, while the statements were not legally objectionable when made, they reflect the speaker's motive and purpose and are thus of probative value in judging his later acts.[27]

2. Of the twenty-nine overt acts charged in the indictment, seventeen were not submitted to the

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[26] *Williamson* v. *United States*, 207 U. S. 425; *Allis* v. *United States*, 155 U. S. 117, 119; *Wood* v. *United States*, 16 Pet. 342, 360–361; *Vierick* v. *United States*, 130 F. 2d 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley*, 132 F. 2d 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States*, 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Howenstine* v. *United States*, 263 Fed. 1, 5–6 (C. C. A. 9); *Steyzel* v. *United States*, 261 Fed. 161, 162 (C. C. A. 8); *Shidler* v. *United States*, 257 Fed. 620, 623 (C. C. A. 9); *Herman* v. *United States*, 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States*, 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States*, 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.

[27] Petitioner's argument (Pet. 35–36) that this evidence is also assailable on the ground that two witnesses did not testify to it is fully answered by the *Cramer* opinion (325 U. S. at 31) as follows:

"* * * What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses."

jury because the Government was not satisfied that it had established those acts by the testimony of two witnesses. In instructing the jury concerning the withdrawn overt acts, the trial judge told the jury that even if the jury believed that the withdrawn acts had been committed by petitioner, "they may not in themselves be made the basis of a conviction under the Constitution," and that "if you believe that the defendant did actually perform any of these other alleged overt acts which were not proven to the degree required by the Constitution, you may consider any such act in determining the question of the intent with which the defendant may have performed" any of the overt acts submitted to the jury (R. 1589–1590).

Petitioner urges (Pet. 36–37), that it was error to permit the jury to consider evidence of withdrawn overt acts even though such evidence was restricted to the issue of intent. He predicates his argument on the statement in the *Cramer* opinion with reference to the withdrawn overt acts (325 U. S. at 39) that, "we cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason." When this language is read in its context, it is evident that the Court was discussing the sufficiency of the overt acts and it was pointing out how much stronger the unsubmitted overt acts were than the

three that were submitted to the jury. The discussion was not concerned with the nature of proof which was admissible on the issue of intent once the overt act was established.

The question which petitioner raises is whether, assuming the overt act is properly established, the jury may be permitted to consider one witness evidence of other unsubmitted overt acts on the issue of intent. The answer is found in the words of the *Cramer* decision which were directed to the question of proving the elements of the crime other than the over act (325 U. S. at 33):

> It would be no contribution to certainty of judgment, which is the object of the provision, to construe it to deprive a trial court of the aid of testimony under the ordinary sanctions of verity, provided, of course, resort is not had to evidence of less than the constitutional standard to supply deficiencies in the constitutional measure of proof of overt acts.

If the withdrawn overt acts had not been charged in the indictment, there would be no question that evidence concerning them would be probative on the issue of adherence to the enemy. We know of no reason in law or experience why, once the overt act is properly established, one witness evidence of other acts may not be considered by the jury solely on the issue of intent, even though those acts may have been charged in the indict-

ment as overt acts and were not submitted to the jury as possible overt acts of treason.[28]

3. Petitioner's sole contention (Pet. 37–38) concerning the evidence of his extra-judicial admissions (*supra*, pp. 21–25) is that the treason clause of the Constitution only permits the use of a confession made in open court. We think he misconceives the meaning of the constitutional provision. The Constitution permits the conviction of a person who confesses his treason in open court and in all other cases it requires that there must be two witnesses to an overt act of treason. But there is nothing in the Constitution which forecloses the Government from establishing the defendant's adherence to the enemy by his extra-judicial admissions, provided, of course, that an overt act is also established by the testimony of two witnesses. It is only when there is no proof of an overt act that a conviction must rest upon a confession in open court. That is not this case.

[28] Petitioner's argument (Pet. 37) that it was improper to permit the Government to cross-examine the witness Zermer as a hostile witness is totally without merit. As we have shown (*supra*, p. 16), Zermer was a friend of petitioner's who had agreed to receive Herbert's mail for him. In the previous trial of petitioner, Zermer gave highly incriminating testimony concerning petitioner's efforts to arrange for Herbert's lodging. Yet at the present trial he professed to have no such information. In these circumstances we think there is no basis for saying that the trial judge abused his discretion in permitting the Government to cross-examine Zermer concerning his previous testimony. (See R. 513–518.)

The *Cramer* decision (325 U. S. at 32) expressly recognizes that all common-law evidence is admissible on the issue of intent. See also Foster's Reports, *Crown Cases*, p. 241.

4. Petitioner is mistaken in his contention (Pet. 38–41) that Burger's testimony and the exhibits introduced through him and various FBI agents were improperly relied upon to show petitioner's treasonable intent. His testimony and the exhibits were admitted in evidence solely upon the issue of Herbert's enemy status and the jury was expressly instructed that this evidence was specifically limited to that issue (R. 1597). The propriety of adducing such evidence to show that Herbert was an enemy agent was recognized by petitioner's counsel at the opening of the trial (R. 44–45; see R. 114, 116, 117, 119, 231) and the evidence was received for this limited purpose without objection by petitioner. Since the evidence was properly confined to that issue there is no real basis for petitioner's present complaint.

III

Petitioner assigns numerous other grounds of alleged error in the trial court, which we think are untenable and do not require extended comment.[29]

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[29] For purposes of brevity, we shall not discuss petitioner's contentions concerning the validity of the indictment (Pet. 41–45), the admissibility in evidence of the Illinois statute on the harboring a member of a family (Pet. 45–46), the

1. Petitioner suggests (Pet. 47) that the government attorneys in their arguments to the jury appealed to passion, prejudice and war hysteria and in support of this contention he refers to his brief in the court below, where excerpts of the arguments are torn from their contexts [30] and are relied upon as being improper. Although the argument was advanced in the court below, none of the judges deemed it sufficiently meritorious even to require discussion. We think that when the arguments of government counsel are read as a whole (R. 1378–1446, 1533–1560), as they must be, they are not assailable. It is evident that counsel argued their case vigorously and with all the persuasiveness at their command. They replied to the contentions developed by petitioner in the course of the trial and to the arguments of his counsel. They represented the Government well, but at the same time, they did not strike any foul blows at the petitioner.

2. With the express approval of petitioner's counsel, the trial judge permitted the jury to take a copy of the indictment, which the jury was told was not evidence (R. 1569–1570), and a copy of

remaining parts of the charge to the jury (Pet. 47–49), and the duration of the jury's deliberations. Each of these questions is, we think, properly answered by the opinion of the court below.

[30] For example, at pages 226 of petitioner's brief in the court below, two quotations from the argument are printed together, while in fact, the two paragraphs are separated by eight pages of argument.

the charge to the jury to the jury room (R. 1603). Petitioner now urges (Pet. 49–50) that this was error. It is settled, however, that such matters are within the discretion of the trial judge and where, as here, there are involved twelve overt acts which the jury was required to pass upon and a lengthy charge, we think there was no abuse of that discretion. *Little* v. *United States*, 78 F. 2d 861, 864 (C. C. A. 10); *Capriola* v. *United States*, 61 F. 2d 5, 7 (C. C. A. 7); *Murray* v. *United States*, 130 F. 2d 442, 444 (App. D. C.); *Garst* v. *United States*, 180 Fed. 339, 345 (C. C. A. 4). Particularly is this so in this case inasmuch as petitioner expressly acquiesced in the trial judge's action. Cf. *Johnson* v. *United States*, 318 U. S. 189, 199–201.

3. The morning after the jury retired, they advised the court, through their foreman, that they desired that the testimony of defense witness Short and government witnesses Hirsch and Robe be read to them[31] (R. 1609). The trial judge summoned counsel on both sides before the court and a discussion was had as to the propriety of

[31] Short had testified that he was a lawyer; that he, accompanied by petitioner's present counsel, interviewed petitioner at the Cook County Jail on July 29, 1942; and that from that interview he concluded that petitioner was insane. (R. 1130–1132, 1136–1137.) The Department's records reveal that a sanity hearing was held before petitioner was tried on the treason charge and that he was found sane. Hirsch and Robe are F. B. I. agents who had testified concerning admissions petitioner made to them on August 5, 1942 (see *supra*, pp. 21–23).

granting the jury's request. Petitioner's counsel opposed granting the request and government counsel expressed concern over granting the request unless petitioner's counsel concurred in the action (R. 1609–1610). The trial judge finally concluded that fairness to the jury required that its request be granted and that a cautionary instruction would adequately protect both sides (R. 1610–1613). Accordingly, the jury returned to the courtroom, the testimony of the three witnesses was read to the jury, and the court then instructed the jury as follows (R. 1650–1650–A):

> Ladies and gentlemen, pursuant to the written request of the jury through your foreman there has been read to you a transcript of the testimony of the witnesses, Short, Hirsch and Robe. The jury are cautioned to bear in mind that they have now heard the testimony of these three witnesses twice while they have heard the testimony of the other witnesses only once, and that they shall not allow the fact that they have heard the testimony of these three witnesses twice to cause them to give undue importance or weight to it. The jury should, on the other hand, consider the testimony of these three witnesses, and that of each of them, as though they had heard it but once and consider it together with all of the other evidence in the case.

Petitioner points to no decisions which disapprove of the practice of repeating testimony to a jury at its request. We think it is a matter for

the discretion of the trial judge. In this case, considering the length and complexity of the trial, the fact that the jury's request related to testimony on both sides of the case, and the cautionary instruction which was given, we perceive no abuse of discretion in doing what the trial judge did.

4. Petitioner's contention (Pet. 54–55) that the verdict of the jury was the result of passion, prejudice, and war hysteria is totally unfounded. That the jury was not influenced by these factors is evident from the record. The jury's verdict was predicated on extensive deliberations. When it was reached the jury indulged in the unusual practice, which reflects its mental attitude toward petitioner, of writing a letter to the trial judge, which all the jurors signed. That letter (I R. 99) states that the jurors performed their duty in accordance with the instructions of the court and that the jurors did not predicate their verdict on their emotions. The letter further recites that having performed their duty, the jurors now felt free to speak from their hearts, and requested the trial judge to be "merciful" to petitioner. The trial judge was so impressed with the letter that he did not sentence petitioner to death as he would otherwise have done (see I R. 112–113). Apart from the fact that the evidence required the result which the jury reached, it certainly cannot reasonably be said that a jury which voluntarily pleaded for mercy for petitioner based its verdict on such extraneous matters as war hysteria, passion, or prejudice.

CONCLUSION

Petitioner has been tried twice for treason and two juries have found him guilty of that offense. Petitioner had a fair trial and we think the trial judge was correct in stating that on the evidence no other verdict was reasonably possible. The case does not require further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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